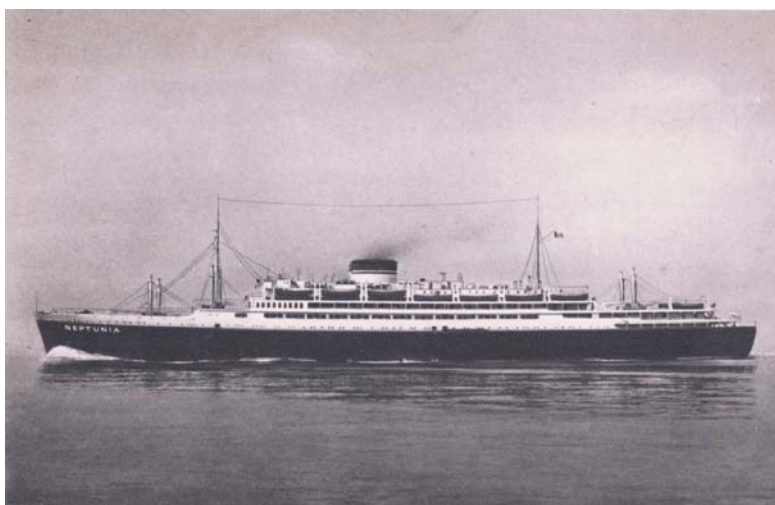


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THE PROTOCOLS CONCERNING THE SETTLEMENT OF TRADE DISPUTES IN THE EURO-MEDITERRANEAN AREA

Los Protocolos relativos a la solución de controversias comerciales en el espacio euromediterráneo

Les Protocoles relatifs au règlement des différends commerciaux dans l'espace euro-méditerranéen

Miguel Ángel CEPILLO GALVÍN¹

I. THE EURO-MEDITERRANEAN AREA AND DISPUTE SETTLEMENT - II. DISPUTE SETTLEMENT IN VIRTUE OF EURO-MEDITERRANEAN ASSOCIATION AGREEMENTS - III. THE PROCEDURES FOR SETTLING TRADE DISPUTES ESTABLISHED BY THE PROTOCOLS SIGNED BY THE EUROPEAN UNION WITH TUNISIA, LEBANON, EGYPT AND JORDAN, AND BY THE AGREEMENT BETWEEN THE EUROPEAN UNION AND MOROCCO - IV. FINAL CONSIDERATIONS

ABSTRACT: In 2010 and 2011, the European Union signed a series of Protocols with Tunisia, Lebanon, Egypt and Jordan, and an Agreement with Morocco, concerning the settlement of trade disputes that might arise in application of the Euro-Mediterranean Association Agreements signed with these countries.

These Protocols provide for a specific, staged mechanism for the resolution of disputes. This paper analyses that mechanism for the resolution of trade disputes and his role in the framework of the Euro-Mediterranean area.

KEYWORDS: Euro-Mediterranean Association, trade dispute settlement mechanism, mediation, arbitration.

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RESUMEN: En los años 2010 y 2011 la Unión Europea firmó una serie de Protocolos con Túnez, Líbano, Egipto y Jordania, y un Acuerdo con Marruecos, relativos a la solución de diferencias comerciales que puedan surgir en aplicación de los Acuerdos Euromediterráneos de Asociación suscritos con tales países.

Tales Protocolos contemplan un mecanismo específico de solución de controversias estructurado en varias etapas. En este artículo se analiza con detalle dicho mecanismo de solución de diferencias y su papel en el marco del espacio euromediterráneo.

PALABRAS CLAVE: Asociación euromediterránea, solución de controversias comerciales, mediación, arbitraje.

RÉSUMÉ: Entre les années 2010 et 2011, l'Union Européenne a signé une série de protocoles avec la Tunisie, le Liban, l'Égypte et la Jordanie, et un accord avec le Maroc, en ce qui concerne le règlement des différends commerciaux qui résultent de l'application des accords euro-méditerranéens d'association établis avec lesdits pays. Les protocoles évoqués comprennent un mécanisme spécifique de règlement des controverses structuré en différentes étapes. Cet article analyse avec détails lesdits mécanismes et leur rôle dans l'espace euro-méditerranéen.

MOTS-CLÉS: Association euro-méditerranéenne, règlement des différends commerciaux, médiation, arbitrage.

I. THE EURO-MEDITERRANEAN AREA AND DISPUTE SETTLEMENT

In 2010 and 2011, the European Union (EU) signed a series of Protocols with Tunisia², Lebanon³, Egypt⁴, and Jordan⁵, and an Agreement with Morocco⁶, concerning the settlement of trade disputes that might arise in application of the Euro-Mediterranean Association Agreements signed with these countries within the framework of the Barcelona Process.

These Protocols provide for a specific, staged mechanism for the resolution of disputes in the Euro-Mediterranean area. Given the specific context in which the above-mentioned mechanism will be applied, it is of particular interest to conduct a detailed analysis of the same.

The scope of action of this dispute settlement mechanism is the Euro-Mediterranean area, with two important constraints: first, it refers exclusively to trade disputes, and second, it is solely applicable to a limited part of

² Published in *Official Journal of the European Union* L 40, 13.2.2010, p. 75.

³ Published in *Official Journal of the European Union* L 328, 14.12.2010, p. 21.

⁴ Published in *Official Journal of the European Union* L 138, 26.5.2011, p. 3.

⁵ Published in *Official Journal of the European Union* L 177, 6.7.2011, p. 3.

⁶ Published in *Official Journal of the European Union* L 176, 5.7.2011, p. 2.

the Euro-Mediterranean area, since the EU has only signed Protocols with five Mediterranean partner countries.

The Euro-Mediterranean Association process arose as a result of a Euro-Mediterranean Ministerial Conference held in Barcelona in November 1995, which culminated in a Declaration defining the pivotal elements of the Euro-Mediterranean Partnership aimed at ensuring peace, stability and prosperity in the Mediterranean basin.

The Declaration established three main objectives: political and security dialogue, economic and financial collaboration and social, cultural and human partnership. The goal of political and security dialogue was to define a common area of peace and stability, while economic and financial collaboration was aimed at constructing a zone of shared prosperity. The social, cultural and human partnership was intended to facilitate the development of human resources and encourage understanding between cultures and exchanges between civil societies.

Consequently, the various Euro-Mediterranean Agreements signed by the European Communities and their Member States with each of the individual third Mediterranean countries were destined to tackle issues related to political dialogue, social and cultural partnership and economic and financial collaboration. A particularly important goal within this latter field was the gradual establishment of a free trade area between all Parties signatory to the agreements.

Furthermore, this association strategy envisaged the gradual creation of a free trade zone in the region as a central element of the Euro-Mediterranean Partnership, which was intended to serve as the initial driver of this process⁷.

Thus, trade issues were accorded a major role, especially the establishment of a free trade area, which necessarily entailed that the Euro-Mediterranean Partnership with each of the third Mediterranean countries initially revolved primarily around this goal.

Hence, the specific mechanism for settling any trade disputes that might arise in the Euro-Mediterranean area defined in the above-mentioned Proto-

⁷ See GARCÍA PEREZ, R., “La Política Euromediterránea: ¿Alternativas a la “vía norteamericana”?”, in GARAU JUANEDA, L. y HUESA VINAIXA, R. (coords.), *Derecho Internacional y Relaciones Internacionales en el Mundo Mediterráneo. Actas de las XVII Jornadas de la Asociación de Profesores de Derecho Internacional y Relaciones Internacionales, 1997*, BOE – AEPPDIRI – Fundació “La Caixa”, Madrid, 1999, p 241.

cols undoubtedly constitutes a significant step forwards, since it is intended to facilitate cooperation on both sides of the Mediterranean in such a fundamental area of the Barcelona Process as trade in goods.

II. DISPUTE SETTLEMENT IN VIRTUE OF EURO-MEDITERRANEAN ASSOCIATION AGREEMENTS

Although the establishment of a specific mechanism for settling trade disputes arising between different members of the Euro-Mediterranean area constitutes a qualitative leap forwards in the resolution of conflicts in the region, it should be noted that the different Euro-Mediterranean Association Agreements signed years before within the framework of the Barcelona Process already envisaged a general procedure for settling disputes arising from the application or interpretation of the agreements⁸.

This procedure comprises two stages, with two different channels for dispute settlement. The first stage consists of negotiation under the auspices of the primary organ of management instituted for the Association Agreements, the Association Council⁹. If the negotiation were insufficient to resolve the conflict, the second stage would be activated, whereby either Party may notify the other of the appointment of an arbitrator, and the other Party must appoint a second arbitrator within two months. Subsequently, the Association Council appoints a third arbitrator. The arbitrators' decisions are binding, and are reached by majority vote.

Thus, negotiation is the first stage, although coordinated by the Association Council, which serves as the consultation framework and possesses a degree of operational autonomy and the capacity to adopt decisions that are binding for the Parties.

Meanwhile, the second stage is only activated if the negotiation coordinated by the Association Council proves insufficient, and consists of the

⁸ We can see, for example, article 86 of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, *Official Journal of European the Union* L 70, 18.3.2000, p. 2.

⁹ See DÍEZ PERALTA, E., "Nuevos desafíos de la política comercial de la Unión Europea en el Mediterráneo", *Revista de Derecho Comunitario Europeo*, 44, 2013, p. 218.

creation of an ad hoc arbitration tribunal with three members, without in principle the existence of a pre-established list of arbitrators.

The Parties are obliged to adopt the measures necessary to implement the arbitrators' decision, although the Association Agreements do not establish how they must resolve the problems that could arise in the application of such decisions.

In sum, this dispute settlement procedure "are very loosely formulated"¹⁰, and currently continues to be applied, albeit partially, even in the case of countries with which the EU has signed the Protocols referred to at the beginning of this paper.

III. THE PROCEDURES FOR SETTLING TRADE DISPUTES ESTABLISHED BY THE PROTOCOLS SIGNED BY THE EUROPEAN UNION WITH TUNISIA, LEBANON, EGYPT AND JORDAN, AND BY THE AGREEMENT BETWEEN EUROPEAN UNION AND MOROCCO

The various Protocols establishing a dispute settlement mechanism applicable to trade disputes that may arise between the EU, on the one hand, and Egypt, Jordan, Lebanon, Morocco or Tunisia on the other, only envisage application of this mechanism in the event that the Association Council is unable to resolve the dispute submitted to it within 60 days¹¹. In other words,

¹⁰ See SZEPESI, S., "Comparing EU free trade agreements. Dispute Settlement", *In Brief*, n. 6G, 2004, p. 2. For this author "The lack of detailed provisions leaves substantial room for political manoeuvre in any case in which the Association Council is not able to resolve a dispute. The appointment of arbitrators may be delayed without formally breaching the agreement. Moreover, the formal obligation to adhere to any decision taken by the arbitrators can easily be frustrated by the reluctance of the defending party to fully implement this decision. Because there is no procedure describing the steps that the complainant should subsequently take, any rulings given by the arbitrators are unlikely to have much of an effect on the MED partners compared with other, more detailed agreements. The overall lack of procedural guidelines could well reduce the credibility of dispute settlement procedures in the MED agreements and deter any party from having recourse to the dispute settlement mechanism if a disagreement arises".

¹¹ See, for example, article 2 of the Agreement between the European Union and the Kingdom of Morocco establishing a dispute settlement mechanism, cited in note 6. From now on we will continue mentioning this Agreement (Agreement EU-Morocco) as it has a similar content to the Protocols signed by the European Union with Tunisia, Egypt, Jordan and Lebanon.

the new procedure established in these Protocols is subject to prior use of the mechanism envisaged in the Association Agreements described in the previous section, although solely the first stage of negotiation under the auspices of the Association Council.

The Protocols have been signed as the result of authorisation granted by the Council in February 2006 to the Commission to open negotiations with its partners in the Mediterranean region in order to establish a dispute settlement mechanism applicable exclusively to trade. The aim is to equip the ever deeper and more complex trade relations in the Euro-Mediterranean region with a simplified and more effective instrument for resolving trade disputes that may arise¹², based on the dispute settlement mechanisms of other agreements signed in recent years by the EU¹³ and the Dispute Settlement Understanding of the World Trade Organisation, although obviously adapted to a bilateral context.

Note that this new mechanism is only applicable to trade disputes, and expressly excludes issues related to the adoption of anti-dumping measures¹⁴.

The procedure may comprise up to three stages. The first of these consists of a request for consultations by one of the Parties aimed at reaching a prompt, equitable and mutually agreed solution. This request must be submitted in writing to the other Party, with a copy to the subcommittee “industry, trade and services”. The consultations must be held within 40 days of the date of receipt of the request and shall be deemed concluded within 60 days of that date, unless both Parties agree to continue them. If the Party receiving the request does not respond to it, or the consultations are not held within the aforementioned period, or they have concluded without reaching

¹² The explanatory statement of the recommendation of the Committee on International Trade of the European Parliament on the draft Council decision on the conclusion of an Agreement between the European Union and the Kingdom of Morocco establishing a Dispute Settlement Mechanism (*doc. A7-0066/2011*, 18.3.2011) says, in this respect, that “the proper application of such a mechanism could increase the security and the predictability of our bilateral trade relations and could represent a further step towards the setting up and the proper functioning of the Euromed Free Trade Area”.

¹³ In this sense Díez PERALTA, E., “Nuevos desafíos de la política comercial...” *cit.*, p. 219 (note 85) points out the Agreements signed by the European Union with Mexico and Chile,

¹⁴ See article 2 of the Agreement EU-Morocco.

a mutually agreed solution, the complaining Party may request recourse to a mediator or the establishment of an arbitration panel.

If the complaining Party decides to request a mediator to settle the dispute, the second stage is launched. To a large extent, this is triggered by the decision adopted by the complaining Party, since the Protocols expressly establish that both the EU and the other five signatory Mediterranean countries shall accord sympathetic consideration to requests for mediation presented within this framework¹⁵.

In addition, the possibility also exists for mediation to continue even when the arbitration procedure has already been launched, if the Parties agree.

Hence, mediation assumes particular importance irrespective of the fact that recourse to the same is always voluntary for the Parties.

Unless the Parties appoint a mediator themselves, the chairpersons of the subcommittee “industry, trade and services”, or their delegates, choose a mediator by lot from among the individuals named in a pre-established list of at least fifteen members, who are not nationals of either of the Parties.

This list is drawn up by the subcommittee and indicates the arbitrators who may form part of the arbitration panel to create should the Parties decide to initiate the arbitration procedure to resolve their differences. Consequently, there is a common list for mediators and arbitrators: as we shall see later, this guarantees proper preparation of the same, and higher consistency of criteria between the two means of dispute settlement, which also share the same code of conduct.

The mediator convenes a meeting with the Parties and receives their submissions prior to the meeting. He or she may also request additional information from the Parties and from experts or advisers if deemed necessary. This information is submitted to each of the Parties for their comments.

The mediator’s opinion may include recommendations¹⁶ on how to resolve the dispute, but this is not binding.

If the Parties fail to reach a resolution by means of mediation, the complaining Party may request the establishment of an arbitration panel, thus triggering the third and final stage of the trade dispute settlement mechanism

¹⁵ See article 4.1 of the Agreement EU-Morocco.

¹⁶ See article 4.3 of the Agreement EU-Morocco.

established by the Protocols¹⁷. The request must be submitted in writing to the Party complained against and the subcommittee “industry, trade and services”.

The arbitration panel consists of three members, and the Parties may reach an agreement on its composition. In the event that this does not occur, either of them may ask the chairpersons of the subcommittee “industry, trade and services”, or their delegates, to select the three members by lot from the a pre-established list of arbitrators mentioned earlier. One is drawn from among the individuals proposed by the complaining Party, another from among those proposed by the Party complained against and the third from among those selected by the Parties to act as chairperson.

This list consists of at least fifteen members, although the subcommittee “industry, trade and services” can establish additional lists with a minimum of another fifteen members with expertise in the sector.

To draw up the list of arbitrators, each Party must propose at least five people, and between them they must also select a minimum of another five people who are not nationals of either of the Parties to exercise the role of chairperson of the arbitration panel.

The arbitrators must have expertise or experience in law and international trade, be independent and serve in a personal capacity without accepting instructions from any organisation or government, and cannot be affiliated to the government of either of the Parties. Similarly, they must respect the code of conduct given in an annex to the various Protocols, which as already mentioned, they share with the mediators.

The arbitration panel first issues an interim report setting out the findings of fact, the applicability of relevant provisions and the rationale for its findings and recommendations. Either Party may submit a written request for the arbitration panel to review precise aspects of the interim report.

¹⁷ VAN DER LOO, G., “Mapping out the Scope and Contents of the DCFTAs with Tunisia and Morocco”. *Papers IEMed*, 28, 2016, p. 14, states that an important difference with the previous standard diplomatic disputes settlement mechanisms is that in this case “either side has the right to establish an arbitration panel and that one party cannot block the initiation of arbitration proceedings by refusing to appoint its arbitrator”.

After that, the arbitration panel reaches a final, binding ruling¹⁸, which includes an analysis of the submissions presented by the Parties, and notifies the Parties and the subcommittee “industry, trade and services”.

Unlike the arbitration procedure established in the Euro-Mediterranean Agreements, the Protocols include a series of rules to ensure compliance with the arbitration ruling. These refer to the determination of the reasonable period for compliance¹⁹, review of the measures taken to comply with the ruling²⁰ and temporary remedies in case of non-compliance²¹.

¹⁸ See article 18 of the Agreement EU-Morocco.

¹⁹ Article 10 of the Agreement EU-Morocco: “The reasonable period of time for compliance.

1. No later than 30 days after the receipt of the notification of the arbitration panel ruling to the Parties, the Party complained against shall notify the complaining Party and the subcommittee ‘industry, trade and services’ of the time it will require for compliance (reasonable period of time), if immediate compliance is not possible.

2. If there is disagreement between the Parties on the reasonable period of time to comply with the arbitration panel ruling, the complaining Party shall, within 20 days of the receipt of the notification made under paragraph 1 by the Party complained against, request in writing the arbitration panel to determine the length of the reasonable period of time. Such request shall be notified simultaneously to the other Party and to the subcommittee ‘industry, trade and services’. The arbitration panel shall notify its ruling to the Parties and to the subcommittee ‘industry, trade and services’ within 30 days from the date of the submission of the request.

3. The reasonable period of time may be extended by mutual agreement of the Parties”.

²⁰ Article 11 of the Agreement EU-Morocco: “Review of any measure taken to comply with the arbitration panel ruling

1. The Party complained against shall notify the other Party and the subcommittee ‘industry, trade and services’ before the end of the reasonable period of time of any measure that it has taken to comply with the arbitration panel ruling.

2. In the event that there is disagreement between the Parties concerning the existence or the consistency of any measure notified under paragraph 1 with the provisions referred to in Article 2, the complaining Party may request, in writing, the arbitration panel to rule on the matter. Such request shall identify the specific measure at issue and it shall explain how such measure is inconsistent with the provisions referred to in Article 2. The arbitration panel shall notify its ruling within 90 days of the date of the submission of the request. In cases of urgency, including those involving perishable or seasonal goods, the arbitration panel shall notify its ruling within 45 days of the date of the submission of the request”.

²¹ Article 12 of the Agreement EU-Morocco: “Temporary remedies in case of non-compliance.

Likewise, there are rules related to the review of measures taken to comply after the suspension of obligations²².

1. If the Party complained against fails to notify any measure taken to comply with the arbitration panel ruling before the expiry of the reasonable period of time, or if the arbitration panel rules that the measure notified under Article 1(1) is inconsistent with that Party's obligations under the provisions referred to in Article 2, the Party complained against shall, if so requested by the complaining Party, present an offer for temporary compensation.

2. If no agreement on compensation is reached within 30 days after the end of the reasonable period of time or of the arbitration panel ruling under Article 11 that a measure taken to comply is inconsistent with the provisions referred to in Article 2, the complaining Party shall be entitled, upon notification to the other Party and to the subcommittee 'industry, trade and services', to suspend obligations arising from any provision referred to in Article 2 at a level equivalent to the nullification or impairment caused by the violation. The complaining Party may implement the suspension 10 working days after the date of receipt of the notification by the Party complained against, unless the Party complained against has requested arbitration under paragraph 3.

3. If the Party complained against considers that the level of suspension is not equivalent to the nullification or impairment caused by the violation, it may request, in writing, the arbitration panel to rule on the matter. Such request shall be notified to the other Party and to the subcommittee 'industry, trade and services' before the expiry of the 10 working day period referred to in paragraph 2. The arbitration panel, having sought, if appropriate, the opinion of experts, shall notify its ruling on the level of the suspension of obligations to the Parties and to the institutional body responsible for trade matters within 30 days of the date of the submission of the request. Obligations shall not be suspended until the arbitration panel has notified its ruling, and any suspension shall be consistent with the arbitration panel ruling.

4. The suspension of obligations shall be temporary and shall be applied only until any measure found to be inconsistent with the provisions referred to in Article 2 has been withdrawn or amended so as to bring it into conformity with those provisions, as established under Article 13, or until the Parties have agreed to settle the dispute".

²² Article 13 of the Agreement EU-Morocco: "Review of any measure taken to comply after the suspension of obligations.

1. The Party complained against shall notify the other Party and the subcommittee 'industry, trade and services' of any measure it has taken to comply with the ruling of the arbitration panel and of its request for an end to the suspension of obligations applied by the complaining Party.

2. If the Parties do not reach an agreement on the compatibility of the notified measure with the provisions referred to in Article 2 within 30 days of the date of receipt of the notification, the complaining Party shall request, in writing, the arbitration panel to rule on the matter. Such request shall be notified simultaneously to the other Party and to the subcommittee 'industry, trade and services'. The arbitration panel ruling shall be

The Protocols also establish that the Parties may always reach a solution to the dispute by mutual agreement, even once the arbitration procedure has been launched²³.

IV. FINAL CONSIDERATIONS

Having reached this point, it should be noted that the trade dispute settlement mechanism provided for in the Protocols signed by the EU with Egypt, Jordan, Lebanon, Morocco and Tunisia constitute a substantial improvement in relation to the dispute settlement procedures envisaged in the Euro-Mediterranean Association Agreements.

As we have seen in the previous section, this new mechanism incorporates a more detailed and complete regulation of the procedure to adopt in order to settle disputes, with more agile and flexible time limits and specific rules to guarantee compliance with arbitration rulings, in the event these are issued.

Nonetheless, I believe it would be advisable to introduce some reforms to improve the mechanism's effectiveness in the Euro-Mediterranean area.

For example, the EU should negotiate other, similar Protocols with all other Mediterranean partner countries, in order to expand its scope of action to the entire Euro-Mediterranean area.

It would equally be desirable for the various Association Councils to agree to create an Appeals body common to all or several of the Euro-Mediterranean Agreements, a possibility already explicitly contemplated in the Protocols analysed²⁴, in order to endow greater coherence to the dispute settlement mechanism these establish.

In addition, there is a need to introduce provisions that promote the participation of women as mediators or members of the arbitration panel, in line

notified to the Parties and to the subcommittee 'industry, trade and services' within 45 days of the date of the submission of the request. If the arbitration panel rules that any measure taken to comply is in conformity with the provisions referred to in Article 2, the suspension of obligations shall be terminated".

²³ See article 14 of the Agreement EU-Morocco.

²⁴ See article 22.2 of the Agreement EU-Morocco.

with the provisions of the Resolution adopted by the General Assembly of the United Nations on 22 June 2011²⁵.

²⁵ Resolution 65/283 “Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution”, particularly paragraphs 4, 8 and 9.

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